

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

October Term 1946

No. 9389

519

FRANCIS BURTON, *Appellant*

v.

ADALYN ELIZABETH BURTON, *Appellee*

APPEAL FROM AN INJUNCTION ORDER OF THE DISTRICT
COURT OF THE UNITED STATES FOR THE DISTRICT OF
COLUMBIA WHICH FORCED APPELLANT TO SUR-
RENDER POSSESSION OF REAL ESTATE

United States Court of Appeals
for the District of Columbia

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v.

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*APPEAL FROM AN INJUNCTION ORDER OF THE DISTRICT
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COLUMBIA WHICH FORCED APPELLANT TO SUR-
RENDER POSSESSION OF REAL ESTATE*

BRIEF FOR APPELLANT

Jurisdictional Statement

Appellee's complaint for limited divorce on the ground of cruelty (Joint App., 1) is within the jurisdiction of the District Court below under Sections 16-403 and 11-306, D. C. Code, 1940. Appellant's Counterclaim (Joint App., 10) is within said jurisdiction under Section 11-306, D. C. Code, 1940, and Federal Civil Rule 13 (a) and (b). On appellee's motion for a restraining order (Joint App., 21) the District Court by its Preliminary Injunction (Joint App., 32) en-

joined appellant from interfering with appellee in "her exclusive right to the use, occupancy, possession, management and control" of the disputed property, and appellant thereunder surrendered possession of and vacated the premises on July 25, 1946 (Joint App., 33). As possession of real estate was changed or affected this Court has jurisdiction of this appeal under Sec. 17-101, D. C. Code, 1940.

Statement of the Case

Appellant appeals of right from the Preliminary Injunction below under which he surrendered and vacated his occupancy and possession of 6432 8th Street, Northwest, Washington, D. C., granted on appellee's motion, and in violation of appellant's right to a hearing or trial of evidence upon his Counterclaim to an equitable ownership of one-half of the equity, and in the face of appellee's default in replying to appellant's counterclaim.

Appellee commenced her action for divorce *a mensa et thoro*, or limited divorce, by filing her complaint on February 6, 1946 (Joint App., 1), claiming therein to own as her separate property the marriage home 6432 8th Street, N. W., Washington, D. C. Appellant filed his answer and counterclaim on March 7, 1946 (Joint App., 7), and in his counterclaim sought judgment "that plaintiff (appellee) holds title to said property impressed with a trust in defendant's (appellant's) favor to the extent of one half of the equity therein", alleging that he made payments to appellee who was the "trustee of the family funds" and "kept them in bank accounts in her name;" that when the parties undertook the purchase of the property in the fall of 1942, the United States was at war and appellant was subject to being drafted for military service; that because of war conditions title was taken in appellee's name alone with the understanding between the parties that it

was their joint property and marriage home; that appellant had made physical improvements about the premises paying for the materials from his own funds and generally acted with respect to the property as if he were an owner with appellee, all with her acquiescence and consent, and that appellant had made payments on the house directly with his own funds and had driven appellee in his automobile to the loan company where appellee made payments on the trust.

Appellee failed to answer appellant's counterclaim, and on May 24, 1946, the clerk declared appellee in default on the counterclaim (Joint App., 13). On May 28th, 1946, appellant filed his motion for judgment by default (Joint App., 14), accompanied by his Affidavit in Support (Joint App., 14), showing that appellee's agent on the premises had stated that 6432 8th Street had been sold.

On June 5, 1946, the judge below filed his memorandum on the appellant's motion for judgment by default (Joint App., 20) wherein he said "The counterclaim, however, raises no new issue, and no judgment can now be had upon it, for the trial of the case upon the complaint and answer will dispose of all the issues raised in the pleadings."

On June 17, 1946, the judge below signed his order (Joint App., 23) denying appellant's motion for judgment by default on his counterclaim, adding in his own handwriting "without prejudice to raise the same issues at the hearing."

On June 5, 1946, the action was calendared for trial (Joint App., 22).

On June 5, 1946, the appellee filed her Motion for a Restraining Order (Joint App., 21). On June 11, 1946, appellant filed his Motion for Interlocutory Injunction to Maintain *Status Quo* and Restrain Appellee from Consum-

inating Sale (Joint App., 22). On July 1, 1946, appellant filed his Objections to Proposed Restraining Order (Joint App., 24).

On July 8, 1946, the judge below filed his memorandum that a temporary injunction would issue (Joint App., 27).

On July 11, 1946, appellant filed his Objections under Civil Rule 46 to Proposed Preliminary Injunction (Joint App., 29).

On July 15, 1946, the judge below signed his "Preliminary Injunction" (Joint App., 32).

On July 18, 1946, appellant filed his Motion to Require Deposit in Registry as Further Security (Joint App., 34), and on July 19, 1946, the judge below signed his Order for Changed and Additional Security (Joint App., 34).

The transcript of docket entries in the record shows that on July 24, 1946, and August 14, 1946, the required security was deposited with the clerk of the court below.

The United States Marshal's return filed July 26, 1946 (Joint App. 35), shows that certified copies of the aforesaid orders of the District Court dated July 15th and 19th, 1946, were served on appellant at 7:30 P. M., on the 24th day of July 1946 (Joint App., 35).

On July 25, 1946, appellant ceased his occupancy and possession of 6432 8th Street, N. W., pursuant to said orders as shown by his notice of appeal (Joint App., 36).

Appellant contends that he was wrongfully driven from his home; that the Preliminary Injunction, from which this appeal is taken, was granted erroneously, is invalid, and should be set aside; that his home and his possession thereof should be restored, and that he should be granted a judgment by default or, at least, a trial of evidence upon his counterclaim.

STATUTES AND RULES.

District of Columbia Code, 1940.

Section 11-306—General jurisdiction.

Said court (District Court of the United States for the District of Columbia) (except as otherwise provided in this title) shall have cognizance * * * of all cases in law and equity between parties, both or either of which shall be resident or be found within said district * * *.

Section 12-303—Declarations, grants, and assignments of trust—Implied Trusts.

* * *

* * *

Where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made.

Section 16-403—Causes for divorce *a vinculo* and for divorce *a mensa et thoro* and for annulling marriages.

* * * A legal separation from bed and board may be granted for cruelty: * * *

Section 17-101—District Court and Court of Appeals.

* * * Appeals shall also be allowed to said United States Court of Appeals for the District of Columbia from all interlocutory orders of the District Court of the United States for the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders * * * granting injunctions, * * *

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 7 (a) Pleadings.

There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; * * *

Rule 12 (a) (Defenses) When Presented.

* * * The plaintiff shall serve his reply to a Counterclaim in the answer within 20 days after service of the answer * * *

Rule 13 (a) Compulsory Counterclaims.

A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * *

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
* * *

(c) Motion and Proceedings Thereon. * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 65. Injunctions.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *

Statement of Points.

1. The Preliminary Injunction does not comply with Civil Rule 65 (d) in that it does not set forth legal and proper "reasons for its issuance". and is entirely too general and vague instead of being "specific in terms" as required, in that

(a) Its necessary effect, without being specific, was that of a permanent injunction ordering and requiring appellant, *forthwith*, to remove from and surrender his home for several years in and partial possession of 6432 8th Street, N. W., and to submit to whatever appellee desired to do therewith, without hearing or trial of evidence, although the record discloses sharp issues of fact disputing any right in appellee to the proposed order.

(b) Its necessary effect, without specification, was to pre-judge and foreclose appellant's rights in 6432 8th Street, without trial of evidence, contrary to due process of law and to appellant's asserted and undisproved rights therein as set out in his Counterclaim.

(c) Its necessary effect, without, specification, was that of a summary judgment for appellee against appellant's asserted rights in said property, although no motion for summary judgment was made, the proceedings required by Civil Rule 56 were not had, and there were clear issues of fact between the allegations of appellant's answer and untried counterclaim and the allegations and affidavits in appellee's behalf upon which the preliminary injunction was based.

2. The Preliminary Injunction was arbitrary and harsh in that it did not provide any reasonable time—no time whatever—in which appellant might remove himself, his clothing, furniture, tools and equipment of his plumbing business and other property from the premises, although he had lived there several years, and in that appellee made no showing requiring such arbitrary and harsh action.

3. The memorandum of the judge below, embodying his findings, in compliance with Civil Rule 52, is erroneous or insufficient in that:

(a) It fails to give appellant every favorable inference from the allegations of his untried counterclaim in that it failed to give effect to appellant's allegations that appellee was the trustee of the family funds kept by her in her own name; that title to 6432 8th Street was taken in plaintiff's name alone with the understanding between the parties that it was their joint property and marriage home, meaning that each had a one half interest in the equity, and that appellant's actions toward the property both in making physical improvements and as owner with appellee's acquiescence and consent, and in making payments thereon from his own funds as well as driving plaintiff to make payments from the family funds as trustee thereof showed that appellant and appellee regarded appellant as a half owner of the property.

(b) It fails to state that:

- (1) Appellant was in partial possession of 6432 8th Street and that he was then and had been since prior to the institution of this litigation actually residing there and using it as his home.
- (2) Appellant secured the entry by the clerk on May 24, 1946, of appellee's default in reply to appellant's counterclaim.
- (3) The order herein of June 17, 1946, denying appellant's motion for judgment of default on his counterclaim, did so "without prejudice to raise the same issues at the hearing."
- (4) Appellant will not suffer irreparable damage and injury, or any damage or injury which cannot be compensated by money, from the Preliminary Injunction and in being forced to leave his home of several years at 6432 8th Street forthwith.
- (5) Plaintiff entered into the contract to sell said property after defendant's counterclaim was asserted and filed on March 7, 1946.
- (6) Appellee's sale was *bona fide* and not for the purpose of circumventing appellant's claim to rights in the property.
- (7) Who the purchaser is, when the contract was entered into, when possession by the purchaser was required thereunder, nor any other facts ordinarily disclosed and set out when a *bona fide* sale is entered into.
- (8) Appellee has a clear case for a Preliminary Injunction in her favor within the rule of *Phillips v. Sager*, 51 App. D. C. 103, 276 Fed. 625.

(c) It failed to find any facts (other than the erroneous conclusion or finding that appellant's counterclaim is insufficient to sustain a resulting trust, while ignoring the allegations of appellant's answer) constituting a clear case

why appellant's Motion for an Interlocutory Injunction to Maintain the *Status Quo* and Restrain Plaintiff (appellee) from Consummating Sale should not be granted.

Summary of Argument

Appellant contends that the Preliminary Injunction, from which this appeal is taken, wrongfully drove him from his home and that appellee's conduct, in deserting him, attempting to appropriate their home, purchased with their joint funds held by the appellee wife and with title taken in her name, is shocking to the conscience and calls for imposition of a trust in his favor.

As the judge below granted the Preliminary Injunction on the record, appellant's allegations in his answer and counterclaim must be taken as true on this appeal.

Even though the property has been sold, the purchaser from appellee is bound by the result of this appeal.

The Preliminary Injunction was issued when appellee was in default in replying to appellant's Counterclaim which alleged the grounds for imposition of a constructive or resulting trust.

Appellant's allegations in his counterclaim support a trust.

The Preliminary Injunction violates Civil Rule 65 (d) in that erroneous reasons are given in its preamble for granting it and it is not specific in terms, as required. It did not specifically order appellant out of the property, but he would have violated its terms if he had remained.

The Preliminary Injunction erroneously had the effect of a permanent injunction and of a summary judgment, and pre-judged and foreclosed appellant's alleged rights in the property without a trial contrary to due process of law.

The Preliminary Injunction was arbitrary and harsh as it gave appellant no time in which to move himself and his personal property from 6432 8th Street.

The findings and conclusions of the judge below, required by Civil Rule 52, were erroneous and insufficient. His principal error was that he held the averments of the counterclaim are insufficient to sustain a resulting trust, when they are sufficient.

A constructive or resulting trust arises where one in a confidential relation, as the appellee wife to the appellant, holding title to property for the benefit of the other, attempts to repudiate the trust and appropriate the property to herself.

Argument

I. Introduction

Appellant contends that he was wrongfully driven from his home; that the Preliminary Injunction, from which this appeal is taken, was granted erroneously, is invalid, and should be set aside; that his home and his possession thereof should be restored to him, and that he should be granted a judgment by default, or, at least, a trial of evidence upon his counterclaim. By this appeal he seeks to secure his right to actual occupancy and possession of 6432 8th Street, N. W., and his ownership of a share therein equal to that of appellee.

Appellee's Conduct Shocking to Conscience

Appellant contends that the conduct of appellee in deserting him and attempting to appropriate to herself their marriage home, which, although title was taken in appellee's name, was purchased with his and her funds held in

trust by appellee with the understanding that it was the joint property of the parties, is shocking to the conscience and calls for relief by imposition of a constructive or resulting trust. The trust, which appellant contends arose by operation of law, partakes of the characteristics of resulting and constructive trusts. See Trusts, 54 Am. Jur. 147, Section 188.

Appellant's Allegations to be Taken as True on This Appeal

Appellant's allegations in his answer and counterclaim must be taken as true on this appeal, as the judge below held against appellant's claim to a trust in his memorandum filed July 8, 1946 (Joint App., 27) on the ground that appellant's allegations are insufficient to sustain a trust. See *Mandley v. Backer*, 73 U. S. App. D. C., 412, 121 F. 2d 875, and *Weeks v. Heurich*, 40 App. D. C. 46, at p. 53, in support of this proposition.

A Preliminary Question—*Lis Pendens*

If there arises any question as to the present status of the property and of the purchaser from appellee who has paid her, as indicated by the transcript of docket entries in the record, the answer is that the property and purchaser are controlled by the doctrine of *lis pendens* which the counterclaim invoked.

This Court in *Merillat v. Hensey*, 34 App. D. C., 398, held that to create a *lis pendens* "that which is sufficient to put one upon inquiry, is all the notice that can be required" (p. 406). "And notwithstanding the particular subject matter may not have been included in the original action or suit, it may be brought in by amendment, and the result upon after-acquired interests therein is the same." (p. 404). Further "When land or an interest therein is in

litigation a purchaser from or under one of the parties thereto is as conclusively bound by the results of that litigation as if he had become an actual party" (p. 404).

See also *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368.

The State of the Record When the Preliminary Injunction Was Under Consideration

Appellant had asserted his interest in the property by counterclaim filed March 7, 1946. Appellee had failed and neglected to reply thereto as required by Federal Civil Rules 7 (a) and 12 (a). The statement of the judge below in his memorandum filed June 5, 1946 (Joint App., 20), denying appellant's Motion for Judgment by Default, that "the counterclaim, however, raises no new issue, and no judgment can now be had upon it, for the trial of the case upon the complaint and answer will dispose of all the issues raised in the pleadings" is incorrect. The complaint flatly claimed the property as appellee's. The answer alleged appellant "is equitably an equal owner of said premises with his plaintiff wife." In order for appellant to secure affirmative relief he had to file his Counterclaim. Federal Civil Rule 7 provides "there shall be a reply, if the answer contains a counterclaim denominated as such." Trial of the cause upon the complaint and answer would not dispose of all the issues raised in the pleadings as stated by the judge below.

The order of June 17, 1946, denying appellant's Motion for Judgment by Default did so "without prejudice to raise the same issues at the hearing," the quoted matter being added in the judge's handwriting.

Appellant stated in his Affidavit in Support of Motion for Judgment by Default (Joint App., 14) that he learned on May 23, 1946, that the property had been sold.

The Preliminary Injunction was granted as though appellant's Counterclaim did not exist. Notwithstanding the judge below by his order of June 17, 1946, denied appellant's Motion for Judgment by Default on his counterclaim "without prejudice to raise the same issues at the hearing," the same judge on July 15, 1946, without a hearing or trial of evidence granted appellee the Preliminary Injunction which forced appellant out of his home which he alleged he owned equally with appellee. The judge below thereby cut off and denied appellant's right to raise his Counterclaim and his Motion for Judgment by Default thereon at the hearing or trial.

Appellant's Allegations Do Support a Trust In His Favor

Appellant alleged under oath that he frequently made payments of money to appellee "as his wife and the trustee of the family funds;" that "plaintiff (appellee) with the acquiescence of defendant (appellant) always managed their family funds and kept them in bank accounts in her name;" that "because of war conditions title was taken in plaintiff's (appellee's) name alone with the understanding between the parties that it was their joint property and marriage home." He alleged also that he made physical improvements and generally acted as an owner with appellee, with her acquiescence and consent; that she deserted him; and that payments on the property were made sometimes by him directly with his own funds and sometimes by appellee. Appellant claimed to be an equal owner of the equity with appellee.

Appellant contends these allegations show and warrant the conclusion that he paid one-half of the cost of the property; that the parties owned it in fact jointly and in equal shares, and that appellee wrongfully deserted appellant. The allegations support a resulting trust.

The conduct of appellee in selling the property after appellant asserted his rights by counterclaim and while she was in default in replying thereto support the finding of a constructive trust.

See:

Trusts, 54 Am. Jr., Sec. 205, p. 160, Sec. 218, p. 167, and Sec. 225 *et seq.*, p. 173.

Husband and Wife, 26 Am. Jur., Sec. 95, p. 721, and Sections 100, 101, 102, p. 726 *et seq.*

Sieger v. Sieger, 162 Minn. 322, 202 N. W. 742, 42 A. L. R. 1.

Ridky v. Ridky, 226 Mich. 459, 198 N. W. 229.

Smithsonian Institution v. Meech, 169 U. S. 398, 42 L. ed. 793.

II. First Error Assigned

The Preliminary Injunction Violates Civil Rule 65 (d)

Civil Rule 65 (d) requires that "Every order granting an injunction * * * shall set forth the reasons for its issuance; shall be specific in terms; * * *."

The Preliminary Injunction does not comply therewith, for it does not set forth correct and legal "reasons for its issuance," and it is too general and vague instead of being "specific in terms" as required.

Nowhere does it specifically order appellant out of 6432 8th Street, N. W., but that is what appellee sought and secured.

In view of the allegations of appellant's counterclaim as to his deposits with appellee and his payments, it was erroneous for the court below to recite that appellee "has either paid or secured herself to pay the full purchase price," and that appellant's "claim to interest in said

premises constitute casual and indefinite payments, if made, and do not constitute a basis for a resulting trust in his favor nor to justify his interfering with plaintiff's exclusive use, control, sale or disposition thereof, or her occupancy of the said property."

The Preliminary Injunction Erroneously Had Effect of Permanent Injunction, and Summary Judgment, and Pre-Judged and Foreclosed Appellant's Alleged Rights in Property Without Trial Contrary to Due Process of Law

Preliminary injunctions ordinarily preserve the *status quo* until trial and do not change it as here, except in the clearest of cases.

The Preliminary Injunction here had all the decisive effect of a permanent injunction as it forced appellant forthwith to surrender and vacate 6432 8th Street so appellee could sell it, as was done. Unless the Preliminary Injunction order be reversed, appellant's rights in the property will have been finally disposed without a hearing or trial of evidence.

It requires no citation of authority to demonstrate and support the proposition that the Preliminary Injunction was issued contrary to due process of law when its necessary effect, without specific terms as required by rule, was to pre-judge and foreclose appellant's alleged rights in 6432 8th Street, and to deny him a trial of evidence to support his allegations.

The appellee made no motion for summary judgment and the proceedings required by Civil Rule 56 were not had. Such a judgment should not be rendered unless the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" as required by Civil Rule 56 (c). The judge below erroneously ignored the issues of material fact raised by appellant's answer and counterclaim.

The remedy of preliminary or interlocutory injunction is generally not available to take possession of property from one party to the suit and transfer it to another, where the title or right of possession is in dispute.

See Injunctions, 28 Am. Jur. Sec. 14, p. 206, at p. 208.

Lacassagne v. Chapuis, 144 U. S. 119, 36 L. ed. 368, 12 S. Ct. 659.

The leading District of Columbia case on preliminary injunctions appears to be Phillips v. Sager, 51 App. D. C. 103, where the plaintiffs, the same as appellant here, sought an injunction *pendente lite* to restrain the sale of real estate. See appellant's Motion for Interlocutory Injunction to Maintain *Status Quo* and Restrain Plaintiff from Consummating Sale, filed June 11, 1946 (Joint App., 22), mentioned in preamble of Preliminary Injunction here in question, and denied at the end thereof. The rule is laid down that "a preliminary injunction will not be granted on *ex parte* affidavits unless in a clear case." The important exceptions include "cases in which the function of the preliminary injunction is merely to maintain the *status quo* until final decree." The Preliminary Injunction was granted contrary to the principles propounded in that case, and therefore should be set aside.

III. Second Error Assigned

The Preliminary Injunction was Arbitrary and Harsh

It did not provide any reasonable time—no time whatever—in which appellant might remove himself, his clothing, furniture, tools and equipment of his plumbing business and other property from the premises although he had lived there several years. This was also true for the reason that appellee made no showing requiring such arbitrary and harsh action.

IV. Third Error Assigned

The Judge's Findings and Conclusions Required By Civil Rule 52 Were Erroneous and Insufficient

The memorandum of the judge below filed July 8, 1946 (Joint App., 27), embodying his findings and conclusions in support of the Preliminary Injunction, in attempted compliance with Civil Rule 52, was erroneous and insufficient.

Civil Rule 52 (a) provides:

“In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and *in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.*” (Italics supplied.)

Court Below Failed to Assume Appellant's Allegations True

The judge below held the averments of the counterclaim “are insufficient to sustain a resulting trust,” but in so ruling failed to accept appellant's allegations as true, which he was required to do. See *Mandley v. Backer*, 73 App. D. C. 412, 121 F. 2d 875, and *Weeks v. Heurich*, 40 App. D. C. 46, at p. 53.

The memorandum of findings and conclusions filed below July 8, 1946, failed to give appellant every favorable inference from the allegations of his untried counterclaim in that it failed to give effect to appellant's allegations that he frequently made payments of money to appellee “as his wife and the trustee of the family funds;” that “plaintiff (appellee) with the acquiescence of defendant (appellant) always managed their family funds and kept them in bank accounts in her name;” that “because of war condition title was taken in plaintiff's (appellee's) name alone

with the understanding between the parties that it was their joint property and marriage home," meaning that each had an equal interest in the equity; that appellant "made physical improvements about the premises paying for the materials from his own funds and generally acted with respect to the property as if he were an owner with plaintiff (appellee), all with plaintiff's (appellee's) acquiescence and consent;" that he sometimes made payments on the house directly with his own funds and on a number of occasions drove plaintiff (appellee) in his automobile to the loan company where plaintiff (appellee) made payments on the trust" meaning from their family trust funds.

Holding the counterclaim was insufficient to sustain a resulting trust was erroneous under the cases and authorities cited above and particularly under *Ridky v. Ridky*, 226 Mich. 459, 198 N. W. 229, where a constructive or resulting trust was impressed in husband's favor where he had turned over his wages to his wife and she held and handled family funds and real estate was purchased by her in her own name.

Court Below Failed to Find Undisputed Facts Favorable To Appellant

The memorandum findings and conclusions below erroneously failed to find or state facts favorable to appellant as follows:

(1) Appellant was in partial possession of 6432 8th Street and that he was then and had been since prior to the institution of this litigation actually residing there and using it as his home. See complaint and answer and counterclaim (Joint App. 1, 7).

(2) Appellant secured the entry of the clerk on May 24, 1946, of appellee's default in replying to appellant's counterclaim. See entry of default (Joint App., 13).

(3) The order herein of June 17, 1946, denying appellant's motion for judgment of default on his counterclaim (Joint App., 23), did so "without prejudice to raise the same issues at the hearing."

(4) Appellant will not suffer irreparable damage and injury, or any damage or injury which cannot be compensated by money, from the Preliminary Injunction and in being forced to leave his home forthwith.

(5) Appellee entered into the contract to sell the property after appellant's counterclaim was asserted and filed on March 7, 1946. Appellee, no doubt, would have alleged, if she could, that she had contracted to sell the house prior to March 7, 1946, but her affidavit of June 3, 1946, filed June 5, 1946 (Joint App., 16) shows that "she has now contracted to sell the house." It is plain that appellee, after appellant asserted his rights, was attempting to circumvent his claim to ownership and possession by selling the property, and that a finding by the court that appellant asserted his claim prior to appellee's sale is an important fact not found by the court.

(6) Appellee's sale was *bona fide* and not for the purpose of circumventing appellant's claim to rights in the property. Appellee by attempting to sell the property after appellant's counterclaim was filed on March 7, 1946, and while in default in filing her reply, raised the implication, which should be found against her in the then posture of the case, that her sale was not *bona fide* and was for the purpose of evading appellant's counterclaim.

(7) Who the purchaser was, when the contract was entered into, when possession by the purchaser was required thereunder, nor any other facts ordinarily disclosed and set out when a *bona fide* sale is made. The court should have required appellee to disclose these facts before ordering appellant out of the property by indirection and appel-

lee's failure to disclose them raised the same implication as set out above.

(8) Appellee has a clear case for a Preliminary Injunction in her favor within the rule of *Phillips v. Sager*, 51 App. D. C. 103, 276 Fed. 625. The judge below could not do this and his action was erroneous and against the rule of that case. Appellant submits that the Preliminary Injunction could not issue properly unless it was clear that appellee would suffer irreparable damage or injury if it did not, and that appellant would not suffer irreparable damage or injury therefrom if it did. He submits further that his allegations raised serious doubts that this could be true, which required that the *status quo* be maintained until final hearing, as he sought by his Motion for Interlocutory Injunction (Joint App., 22). *Phillips vs. Sager, supra*, lays down the rule that preliminary injunctions will not be granted unless in a clear case, the exception being to preserve the *status quo* in doubtful cases. Appellee's case was not so clear as to warrant the Preliminary Injunction; therefore it was granted erroneously. The court below also erroneously refused to maintain the *status quo* by denying appellant's Motion for Interlocutory Injunction.

Court Below Ignored Appellant's Allegations in His Answer and the Issues Raised Thereby

The memorandum findings and conclusions below, while holding the averments of the Counterclaim are insufficient to sustain a resulting trust, erroneously ignored the allegations of appellant's answer that appellee "was enabled to make the \$1,000 payment and subsequent payments thereon because of defendant's (appellant's) contributions to the plaintiff (appellee) for their marriage benefit;" that appellee "is equitably an equal owner of said premises with his plaintiff wife;" and that appellee "without justification,

has attempted to and by this proceeding is attempting to rid herself of this defendant (appellant) by coldness toward and withdrawal from him, which defendant (appellant) avers constitutes desertion by her, and also to appropriate and keep their marriage home."

These allegations raised issues of fact which required the maintenance of the *status quo*, as appellant sought by his motion to that effect. Yet the court contrary to appellant's said allegations and motion and the rule of *Phillips v. Sagar, supra*, did not and refused to maintain the *status quo* until trial, but destroyed it by the Preliminary Injunction which forced appellant out of his home.

The judge below in granting the Preliminary Injunction erroneously overlooked the law of the case laid down by him in his memorandum filed June 5, 1946, denying appellant's Motion for Judgment by Default as follows:

" * * * The counterclaim, however, raises no new issue and no judgment can now be had upon it, for the trial of the case upon the complaint and answer will dispose of all the issues raised in the pleadings."

Usual Presumption When Husband Provides Funds for Home Where Title is Taken in Wife's Name

Ordinarily a husband is legally and morally bound to provide a home for his wife, and when he complies with that obligation by the expenditure of his personal funds, he cannot, in the absence of a valid express agreement, lay claim either at law or in equity to reimbursement from his wife or against the property. See *Fry v. National Savings & Trust Co.*, 53 App. D. C. 191, 289 Fed. 589.

In such cases there is no question of express oral trust which fails under the Statute of Frauds and is cured by holding a resulting trust, or of wrong by the wife against the husband and attempting to benefit at the husband's expense by that wrong.

Here Appellee Wife Had Agreement With Appellant That They Were Joint Owners in Equal Shares, and Deserts Him and Attempts To Profit by Her Wrong

Appellant, as hereinabove stated, contends that his allegations support a declaration of trust in his favor because of appellee's confidential relationship to him and her wrong against the agreement with him as to the property and her desertion of him, such trusts being known as trusts *ex maleficio* or *ex delicto*.

See *Ridky v. Ridky*, 226 Mich. 459, 198 N. W. 229.
Jasinski v. Stankowski, 145 Md. 58, 125 Atl. 684,
 35 A. L. R. 275.

Sieger v. Sieger, 162 Minn. 322, 202 N. W. 742, 42
 A. L. R. 1.

Metzger v. Metzger, 338 Pa. 564, 14 A. 2d 285,
 129 A. L. R. 683.

The principles enunciated in *Haliday v. Haliday*, 56 App. D. C. 11 F. 2d 565, are submitted as strong authority for appellant's contentions. While that case uses the term "resulting trust" it appears that its facts bring it within the equity rule setting up constructive trusts, where the trustee must be guilty of some wrong toward the *cestui que trust*. In the instant case, as pointed out in the cited case, it would appear that the usual presumption of an advancement or settlement on the wife should not be indulged here as it would "have the effect of stripping the husband of all his property and leave him at" an age of well over forty years, without the home in which he had made a substantial investment, all because of the appellee's desertion and appropriation of their home contrary to their agreement.

The present case is not within the Statute of Frauds (Section 12-303, D. C. 1940), being exempted by the provisions of the third paragraph of this section. Implied or resulting trusts are recognized by the law in force in the District of

Columbia, and it is well settled in this jurisdiction that such trusts may be established by parole evidence. *Haliday v. Haliday*, 56 App. D. C. 179, p. 181, 11 F. 2d 565.

"It is also a settled rule that if a person acquires title to lands by means of an intentionally false and fraudulent verbal promise either to hold the same for a specified purpose or to convey or reconvey to a designated individual and, having thus fraudulently obtained title, retains the property as his own, equity will regard such person as holding the property charged with a constructive trust and will compel him to fulfill the trust by conveying according to his engagement." "To permit the trust to be repudiated and the evil-doer to retain the fruits of his fraud would be wholly at variance with the fundamental principles of equity." " * * * in such cases it is not necessary that actual fraud be shown but only the establishment of such conduct and bad faith on the part of the defendants as would shock the conscience of the chancellor." From *Mandley v. Backer*, 73 App. D. C. 412, 121 F. 2d 875. See examples cited in 35 A. L. R. 307 *et seq.*, 45 A. L. R. 854 *et seq.*, 80 A. L. R. 204 *et seq.*, 129 A. L. R. 695 *et seq.*, and 159 A. L. R. 1007, holding that a constructive trust arises where, as here, a confidential or fiduciary relationship exists between the parties and the party holding title by repudiating the trust obtains an unconscionable advantage over the confiding trustor and beneficiary.

The strongest case for holding that a constructive trust for appellant arises on the pleadings that counsel has found is *Ridky v. Ridky*, 226 Mich. 459, 198 N. W. 229. There it was held that a constructive trust arose in favor of a husband, who turned over his wages to his wife, in property purchased by her with the understanding that it was to be for the benefit of both of them. That is appellant's allegation here.

The quotation from Perry on Trusts, Sec. 166, quoted in *Spignul v. Blundon*, 53 App. D. C. 29, at p. 31, 287 Fed. 1006, is particularly apt here. It is

“If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society.”

The rights of appellant, a husband who has been deserted and whose wife seeks to deprive him of his interest in their marriage home, and the rights of many husbands who, completely trusting their wives, have turned over to them their earnings and have permitted them to buy real estate in their names with the understanding that such real estate is their joint property in equal shares, call for holding appellee the trustee of the legal title for herself and appellant in equal shares.

Conclusion

The appellant submits that the Preliminary Injunction should be reversed and set aside, with direction to the District Court below to restore to him his home at 6432 8th Street, N. W., and possession thereof and to grant him a judgment by default upon his Counterclaim or a trial of evidence thereon.

Respectfully,

H. CLAY ESPEY,
Attorney for Appellant.

ADJUTANT

JOINT APPENDIX
Case No. 9389

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JOINT APPENDIX

Case No. 9389

1

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA.

ADALYN ELIZABETH BURTON, 4624 12th
Street, N. E., Washington, D. C.,

Plaintiff,

vs.

FRANCIS BURTON, 6432 8th Street, N. W.,
Washington, D. C.,

Defendant.

Civil Action
33018.

Filed
Feb. 6, 1946.

**Complaint for Divorce a Mensa et Thoro and
for Other Purposes**

The petition of Adalyn Elizabeth Burton respectfully represents to this Honorable Court the following:

1. That she is a citizen of the United States and has been a resident of the District of Columbia for more than one year prior to the filing of this complaint; that she herein sues the defendant in her own right and as the wife of said defendant.

2. That the defendant, Francis Burton, is a citizen of the United States and a resident of the District of Columbia, and is herein sued in his own right and as the husband of the plaintiff.

3. That the plaintiff and defendant were lawfully married in the City of Baltimore, Maryland, on the 6th day of

February, A. D. 1932; that following their said marriage they returned to the District of Columbia and have lived here continuously since that said date as man and wife up to the time of their separation, as is hereinafter alleged; and that no children were born as the result of said marriage and union.

4. That the plaintiff was employed gainfully prior to her said marriage to defendant, and has remained so employed throughout her entire married life, and has almost wholly maintained and supported them in their marital home, the defendant for a great part of said time failing either to be properly employed or at all, and when employed failed and refused to adequately contribute to the expenses of maintaining their said home, and has never supported and maintained plaintiff; that she seldom,
2 if ever, knew what defendant's income was or what he did with the same when he earned anything, although she did all in her power to enable him to establish himself in first one business or the other, by furnishing him with the funds to start the same, or to give bond required therefor, this with her own funds, and if he ever repaid her, it was only to again borrow the same; that he seldom, if ever, considered her or her welfare or have any regard for her efforts to maintain a normal home and home-life therein, failing to respect meal times or hours for congeniality thereafter and at other times after her work; that he would leave the home just when she had the meals ready to be served, without any reason and not telling her where he was going or when he expected to return, and would go away over the week ends and holidays without her, neither telling her where he was going or when he expected to return; and that all of such and like conduct embarrassed her before other members of their household, his father who she supported in their home for about the first ten or twelve years of their married life, and those

whom plaintiff had taken in to live with them to aid her in meeting the costs of running and buying the home; and that all such and other unfair and unreasonable conduct on the part of defendant toward plaintiff, caused her to become sick and ill, upset her nerves, necessitated her to require medical treatment to repair her health and to be able to continue in her employment and household duties.

5. That the defendant is a plumber by trade, although he has engaged in other work for short period of time, and in none of which has he apparently been successful, that is to say, he attempted to operate a pool room, and failed, was employed as an insurance agent but apparently did not earn any money in it, worked for the government for several months and for a local utility for a similar length of time, and either quit or was released for reasons unknown to plaintiff, and finally over plaintiff's objections he enlisted in the Army in April 1943 when he was about 40 years of age and at a time when plumbers could demand and receive excellent wages, but again he was released in a matter of several months, to wit, in October 1943, during all of which time plaintiff had to carry the lion's share, if not all, of the expenses incident to their living, and when

3 he returned from the army he remained out of employment for months again; that by reason of defendant's, complained of conduct, as aforesaid and in this complaint stated, plaintiff told defendant upon his return from the army that she was unwilling to continue on as they had in the past and that unless he saw fit to perform in keeping with his marital obligations that she did not intend to live with him beyond the time of the life of his father, who then was rapidly declining in health; that defendant then agreed that he would leave after his father's death, but upon the death taking place in February 1944 he refused to do so, and only became more unbearable in

his treatment of plaintiff, forcing her to take refuge in the room of one of the women roomers in the home so as to enable her to get some rest at night and relief from his constant nagging; that he would arouse the household by endeavoring to force her to return to his room and bed, much against her will; that on one occasion during the latter part of the summer last past, to wit, 1945, he forced his way into said room, cursed plaintiff and dragged her from her bed and forced her to go down stairs into his room and there brutally struck her making her cry; and that on another occasion in the latter part of August or first part of September 1945 he again forced her to go to his room with her, cursing and striking her in a brutally hurtful manner; and that for all the foregoing causes of brutality plaintiff was compelled to flee her said home, which she rightfully owns, has bought, and is paying for, as is hereinafter alleged, and take up an independent home in that of a friend, thus paying for two homes, so as to enable her to live in peace, safety, and engage in her proper employment.

6. That in November 1942 they moved into premises 6432 8th Street, N. W., in this City and District, which plaintiff purchased by paying the \$1,000.00 cash as the down payment therefor, and assuming the obligation to pay the balance; that the total purchase price therefor was \$7,750.00, and plaintiff has made the payment required therefor since that said time; that she has rented rooms therein to assist her in so doing, and that since the date when she was forced to flee her said home, to wit, on September 25th, A. D. 1945, she has left an aunt, who has not only been helping plaintiff by paying her way in said home but also by her comfort and companionship, to take care of plaintiff's interests in said home; that plaintiff has demanded that defendant move out of her said home, and remove all of his pipes, plumbing supplies and the

4 like, which now clutter up the cellar and the garage, but he has refused and continues to refuse to vacate the same, although he has neither right, title or interest therein other than his said wrongful usurpation thereof; that as recently as in January 1946 he entered the sleeping room of plaintiff's said aunt, while the latter was at her place of employment, and when she returned late in the night therefrom, which her work so requires, she found him, the defendant, occupying her bed and room and refused to get out of it, thereby forcing her to sleep in the room with another woman boarder or roomer; that this he again repeated on the next night, even though said aunt removed such of his things from her said room as he had wrongfully brought in, and again she found him occupying her said room when she returned from her employment, so that she was compelled, with the permission of plaintiff, to obtain the services of a locksmith and place a safe lock on said door so as to keep defendant from entering the same; that defendant has in other ways interfered with other roomers in said home to the detriment of plaintiff's rightful interest therein.

Wherefore, the premises considered, plaintiff prays:

1. That this Honorable Court cause to issue forth its proper writ directed to the defendant requiring that he appear herein, at a time and on a day therein made certain, and answer to the exigencies of this Complaint.

2. That the defendant be required to show cause, if any he may have, why this Court should not enter its order herein restraining him from occupying the home of plaintiff and interfering with and molesting plaintiff, and those occupying the same under her, in the occupancy thereof.

3. That *pendente lite* and finally plaintiff be awarded alimony, court costs and counsel fee from the defendant.

4. That upon final hearing of this cause the plaintiff be awarded a divorce *A Mensa et Thoro* from the said defendant on the grounds of cruelty.

5. And for such other and further relief as to the court may appear just and proper.

/s/ ADALYN ELIZABETH BURTON.
Plaintiff.

5 District of Columbia, ss.:

ADALYN ELIZABETH BURTON, being first duly sworn according to law, on oath, deposes and says, that she is the plaintiff in the above entitled cause, that she has read the foregoing and annexed Complaint by her subscribed, and knows the contents thereof; that those matters and things stated as facts therein, are true, and those stated on information and belief, she believes to be true.

/s/ ADALYN ELIZABETH BURTON,

Subscribed and sworn to before me this 6th day of February, A. D. 1946.

/s/ BENNETT S. JONES,
*Notary Public in and for the
District of Columbia.*

(Seal)

S. JAY McCATHRAN, JR.,
Washington Loan & Trust Building,
Washington, D. C.,
Counsel for the Plaintiff.

**6 Answer of Defendant Francis Burton to Complaint
for Limited Divorce, and Counterclaim to
Impress a Trust Upon Real Estate.**

(Filed March 7, 1946.)

The defendant, Francis Burton, for answer to the complaint herein denying any cruelty to plaintiff, respectfully shows to this Honorable Court as follows:

1. Defendant admits the allegations of Paragraph One.
2. Defendant admits the allegations of Paragraph Two.
3. Defendant admits the allegations of Paragraph Three.

4. Answering Paragraph Four, and denying any cruelty, defendant admits that plaintiff was gainfully employed prior to their marriage and has so continued since their marriage; that plaintiff did assist defendant in starting in several businesses, but was always repaid; and that on a few occasions defendant left their home and missed meals because of business or other good reasons, and also went away over week ends and holidays, plaintiff knowing about his absences. Defendant denies all the other allegations of Paragraph Four. Defendant avers that plaintiff worked uncertain hours, sometimes during the day and sometimes at night, and that plaintiff on a number of occasions suggested that defendant eat out. Defendant further denies any conduct of his toward plaintiff caused any illness of plaintiff or required any medical attention.

5. Answering Paragraph Five, and denying any cruelty, defendant admits he is a plumber by trade and has engaged in other work. The pool room business failed because of the bank holiday and accompanying depression.
7. He was an insurance agent for a short time, but discontinued this employment because the

remuneration was insufficient. He worked for the government and a local public utility, but was laid off through no fault of his. He did enlist in the Army of the United States in April, 1943 because of patriotism and to avoid being drafted which appeared imminent, as the parties have no children. He was medically discharged in October, 1943 under honorable conditions. While defendant was in the Army his rating was Technical Sergeant and he sent plaintiff an average of over One Hundred Dollars per month. Upon his discharge defendant substantially improved their home and worked outside on odd plumbing jobs. In about two months he secured regular employment as a plumber. Defendant admits that plaintiff told him she did not intend to live with him beyond the life of his father, but did not make the other statements alleged in connection therewith. Plaintiff frequently asked defendant to agree to leave upon his father's death, but defendant always trying to placate and get along with his wife told her that he might or he might not. He denies that after his father's death in February 1944 any conduct of his forced her to take refuge in the room of one of the women roomers and that he nagged her. He denies arousing the household and endeavoring to force her to return to him, although he tried to persuade her to do so. He denies forcing his way into any room, during the latter part of the summer of 1945, cursing plaintiff and dragging her from her bed, forcing her to go down stairs into his room and brutally striking her. He denies that in the latter part of August or first part of September 1945 he forced her to go to his room with him, cursing and striking her in a brutally hurtful manner. He denies all brutality and cruelty to plaintiff and that she was compelled to flee her said home to live in peace, safety and engage in her proper employment, and avers that plaintiff deserted defendant on September 25, 1945. All allegations not specifically answered are denied.

8 6. Defendant admits that in November 1942 they moved into premises 6432 8th Street, N. W. Plaintiff was enabled to make the \$1,000 payment and subsequent payments thereon because of defendant's contributions to the plaintiff for their marriage benefit. Defendant upon information states that the monthly payment on the trust is \$59.50 and that the payments by roomers now cover this outlay. Plaintiff deserted defendant by leaving their said home without justification on, to-wit, September 25, 1945, leaving her aunt in charge of plaintiff's interests. Defendant denies that plaintiff has demanded that defendant move out and remove his plumbing equipment and supplies, but admits that he will not vacate the premises as he avers that he is equitably an equal owner of said premises with his plaintiff wife. Defendant admits that in January, 1946 he entered the back bed room which was not being occupied by plaintiff's aunt and slept there. Plaintiff's aunt was not forced to sleep in the front room with another woman boarder or roomer, as she was already sleeping in said front room. Defendant admits that a lock was placed upon the door of the back bed room which kept him from entering the same. Defendant denies all other allegations of paragraph six.

7. Further answering the complaint, defendant avers that he has always conducted himself as a good husband should, desires and offers reconciliation with plaintiff, and that plaintiff, without justification, has attempted to and by this proceeding is attempting to rid herself of this defendant by coldness toward and withdrawal from him, which defendant avers constitutes desertion by her, and also to appropriate and keep their marriage home.

WHEREFORE, the premises considered, defendant prays that the complaint be dismissed.

COUNTERCLAIM TO IMPRESS A TRUST UPON REAL ESTATE.

Defendant always to the limit of his capacity contributed to the maintenance and support of the plaintiff and
9 their home, making substantial payments of money to her frequently as his wife and the trustee of the family funds, even though she was gainfully employed. Plaintiff with the acquiescence of defendant always managed their family funds and kept them in bank accounts in her name. When the parties undertook the purchase of 6432 8th Street, N. W., Washington 12, D. C., in the fall of 1942, the United States was at war, and, because they were childless, defendant was subject to being drafted for military service. Although it was contemplated and discussed that title to said property be taken in the names of both parties, nevertheless because of war conditions title was taken in plaintiff's name alone with the understanding between the parties that it was their joint property and marriage home. While defendant was in the Army of the United States in 1943 he sent home to plaintiff an average of over one hundred dollars a month. Before and after defendant's army service he made physical improvements about the premises paying for the materials from his own funds and generally acted with respect to the property as if he were an owner with plaintiff, all with plaintiff's acquiescence and consent. During the month of September, 1945, within two weeks of the 25th, when plaintiff deserted defendant, he deposited with her not less than one hundred and fifteen dollars. While they lived together in said house, defendant used his funds for the purchase of food for their joint use, paid utility bills, *sometimes made payments on the house directly with his own funds* and on a number of occasions drove plaintiff in his automobile to the loan company where plaintiff made payments on the trust.

WHEREFORE, the premises, considered, defendant prays the Court to order that plaintiff holds title to said property impressed with a trust in defendant's favor to the extent of one-half of the equity therein.

H. CLAY ESPEY,
Attorney for Defendant,
313 Southern Building,
Washington 5, D. C.

10 District of Columbia, ss.:

FRANCIS BURTON, being duly sworn, on oath says: that he has read the foregoing answer and counterclaim signed in his behalf by his attorney, and that he verily believes the statements thereof are true.

(S)FRANCIS BURTON.

Subscribed and sworn to before
me this 6th day of March, 1946.

(S) Weems Franklin,
Notary Public, D. C.

My Commission expires: January 14, 1949.

**11 Affidavits in Support of Application to Clerk to
Enter Plaintiff's Default in Failing to Reply
to Counter-Claim**

(Filed May 24, 1946.)

District of Columbia, ss.:

FRANCIS BURTON, being first duly sworn according to law, on his oath deposed and said: that he is the defendant in the above-entitled action and that he has never been

served with a reply to his counter-claim, denominated as such, filed herein March 7, 1946.

(S) FRANCIS BURTON, *Defendant.*

H. CLAY ESPEY, being first duly sworn according to law, on his oath deposed and said: that he is the attorney of record for defendant in the above-entitled action, and that he has never been served with a reply to defendant's counter-claim, denominated as such, served upon plaintiff's attorney by prepaid United States Mail and filed herein March 7, 1946; and that in the Municipal Court of the District of Columbia after the expiration of twenty days for plaintiff's reply to said counter-claim he saw and requested of plaintiff's attorney of record, S. Jay McCathran, Jr., when he was going to serve plaintiff's said reply to said counter-claim, to which said attorney replied that he did not know that he had to file and serve such reply.

(S) H. CLAY ESPEY,
Attorney for Defendant.

Subscribed and sworn to by Francis Burton
and H. Clay Espey this 24th day of May, 1946.

(S) James F. Norris,
Notary Public, District of Columbia.
My commission expires: Feb. 15, 1951.

12

Affidavit in Support of Default

(Filed May 24, 1946.)

DISTRICT OF COLUMBIA, SS.:

H. CLAY ESPEY, being first duly sworn on oath, deposes and says that he is the attorney of record for the defend-

ant in the above-entitled cause; that the plaintiff Adalyn Elizabeth Burton was served with a copy of defendant's Counter-Claim to Impress a Trust Upon Real Estate by mailing a copy thereof, postage prepaid, to plaintiff's attorney of record, S. Jay McCathran, Jr., Esq., at his last known address, Washington Loan & Trust Building, Washington 4, D. C., on the 7th day of March, 1946; that no reply has been filed by the plaintiff to said counter-claim and none has been served upon the attorney for the defendant, as required by Rule 7 of the Rules of Civil Procedure for the District Courts of the United States; that no extension has been given and the time for filing such reply has expired; that the plaintiff is neither an infant nor incompetent person.

The clerk is requested to enter a default against said plaintiff.

(S) H. CLAY ESPEY.

Subscribed and sworn to before me this 24th day of May, 1946.

CHARLES E. STEWART, *Clerk.*
By H. N. GRAVES,
Deputy Clerk.

(Filed May 24, 1946.)

It appearing that Adalyn Elizabeth Burton has failed to answer the counter-claim filed herein by Francis Burton and served on the plaintiff by mail on the 7th day of March, 1946, and an affidavit on behalf of Francis Burton having been filed, it is this 24th day of May, 1946, declared that

Adalyn Elizabeth Burton herein is in default on the counterclaim.

CHARLES E. STEWART, *Clerk.*
By ELEANOR E. JOBE,
Dep. Clerk.

14 **Motion for Judgment by Default**

(Filed May 28, 1946.)

Comes now the defendant, by his attorney, and moves the Court to enter a judgment by default for defendant upon his verified counterclaim against plaintiff herein, the clerk's entry of default having been made May 24, 1946, and for grounds states that defendant's said counterclaim was served by United States mail, postage prepaid, and filed on March 7, 1946, but the required reply from plaintiff has never been served and filed.

H. CLAY ESPEY,
Attorney for Defendant,
313 Southern Building,
Washington 5, D. C.

15 **Affidavit in Support of Motion for Judgment
by Default**

(Filed June 1, 1946.)

DISTRICT OF COLUMBIA, SS.:

FRANCIS BURTON, being first duly sworn, on his oath deposed and said: that he is the defendant in the above-entitled action and the party who in his answer herein made a counterclaim to impress a trust upon 6432 8th Street, N. W., on Lot 1 in Square 2976 in the District of Columbia; that on or about May 16, 1946, while he was absent from said premises at his work the living room furniture, large

radio and a twin bed suite of bed room furniture were removed from said premises; that affiant was informed by Mrs. Margaret Haines, aunt of plaintiff and plaintiff's agent on the premises, in response to this defendant's inquiry, that the moving men who removed said furniture first inquired if defendant was on the premises and stated that they were instructed, if this defendant were present, that they were not to remove anything, but to ask this defendant to get in touch with plaintiff's attorney, Mr. McCathran, or his attorney, who is Mr. Espey; that this defendant and his attorney had nothing to do with the removal of said furniture and radio;

That defendant was in said premises on May 23, 1946, when Mrs. Margaret Haines, aunt and agent of plaintiff, who lives in said premises, served the original of plaintiff's notice to Mr. H. M. Hawk, another roomer in said property, a copy of which is attached, marked "Defendant's Exhibit 'A'," upon said Hawk; that at that time plaintiff's said aunt stated to this defendant that said property 6432 8th Street, N. W., Washington, D. C., (Lot No. 1, Square 2976), had been sold and asked this defendant if he knew who the buyer might be; that this defendant has not engaged either alone or with plaintiff, directly or indirectly, to sell said property; that defendant continues to reside there and to regard it as his home and property.

s/ FRANCIS BURTON.

Subscribed and sworn to before me this 1st day of June, 1946.

(S) JAMES F. NORRIS,
Notary Public, District of Columbia.
My Commission expires: Feb. 15, 1951.

18

Affidavit of Plaintiff

(Filed June 5, 1946.)

District of Columbia, ss.:

ADALYN ELIZABETH BURTON, the plaintiff in the above entitled cause, being first duly sworn on oath, deposes and says that she purchased premises number 6432 8th Street, N. W., in this City and with her own funds paid the cash down payment of \$1,000.00, raising the same by selling bonds which she owned prior to her marriage to defendant and borrowing the small additional amount needed to make up the \$1,000.00 which she subsequently paid; that she assumed the remaining obligation of the unpaid purchase price alone signing the note and deed of trust therefor and that she has made each and every payment due on account of the same since that said time from her own separate funds; that she alone is solely obligated to pay said note and the balance due for the purchase price of this house.

Deponent further says that the contract for said sale and the deed therefor was made and taken in her name exclusively, which contract and deed plaintiff will evidence to the Court upon a hearing requiring the same; that she paid off one trust and refinanced the same in her name, the release therefor being given to her, which release she also will evidence to the Court at proper time; that the insurance protecting said property and the certificate of title showing the same in her name likewise secures her and no one else.

That in keeping with her right and by virtue of the wrongful conduct of the defendant forcing her to flee her home she has now contracted to sell the house, which contract is also in her name and she offers the same to the Court.

19 Plaintiff further swears that defendant never made a single payment on the property in question with his own funds and never gave her the money therefor and that the only time he ever drove plaintiff to the bank to make said payments was when he forced her to ride with him immediately prior to the instituting of her suit for divorce; that there never was any understanding or agreement written or oral that this property will be treated as joint property and outside of doing some normal amount of work customarily done by the man or husband in a home defendant has not invested any sums therein in labor other than changing certain radiators and installing a shower for his own convenience in the cellar, he being a plumber by trade and he invested very little in so doing.

Plaintiff further says that she never was the trustee for the family funds in spirit or in fact; that the only time defendant sent her any monies was during his enlistment in the United States Army in 1943 where for a period of five months he sent her a total of \$500.00, part of which she looked upon as her rightful allotment and practically all of the remainder, if not more, was returned to defendant at his request for trips to Washington and other expenses upon his demand.

Plaintiff owns all of the furniture within the home, having independently contracted for its purchase and paid the prices therefor, with the exception of one or two pieces of furniture belonging to defendant's parents, now deceased, in which she claims no right; that she has notified the one tenant remaining in the home by proper notice to quit by the first of July, so that the property may be vacated in time to conclude the contract of sale which she has entered into; that defendant continues to interfere with her rightful ingress and egress from the premises, has refused to move therefrom, has collected the rent from the

said tenant wrongfully, although plaintiff has designated her aunt and an occupant thereof to collect the same, a fact well known to defendant; that she has rightfully sold and removed some of her own furniture from the home during defendant's absence presumably at work and that she is afraid for her health and safety to return to the premises by reason of defendant's presence therein.

20 Plaintiff denies each and every allegation made by the defendant in his affidavit filed in support of judgment dated the first day of June, 1946, not otherwise admitted in this affidavit of hers and her bill of complaint filed herein.

(s) ADALYN ELIZABETH BURTON.

Subscribed and sworn to before me this
3rd day of June, 1946.

(s) Bennett S. Janes,
(Seal) Notary Public, D. C.

21 **Affidavit of Margaret L. Haines**
(Filed June 5, 1946.)

District of Columbus, ss.:

I, MARGARET L. HAINES, being first duly sworn according to law, on oath, deposes and says; that I am the Aunt of the plaintiff in the above entitled cause and that I know the defendant therein; that I have lived with my said niece in her home beginning with a time prior to her purchase of her property located in this City and District, and known as premises numbered 6432 8th Street, Northwest, and that I still live in said premises, having remained there at the request of the plaintiff, to act as her agent therein following the time when she was forced to move therefrom

by reason of her fear of the defendant, her husband; that she was present when plaintiff signed the contract to purchase said home, to wit on or about September 2nd, 1942, at which time defendant was also present; that she saw plaintiff contract in her own name for said purchase and knows that plaintiff paid her own money therefor; that neither at that time or at any thereafter did defendant evidence that he thought the said home was being purchased by plaintiff jointly with him, but to the contrary, he stated, at the time the said contract was signed, to the plaintiff, that "you have certainly bitten off alot and I hope you will be able to carry it", to which plaintiff replied that she would pay for the house, as she would rent rooms to assist her; that she knows that plaintiff has paid from her own resources and from the renting of the rooms, all the payments due on the house.

Deponent further states: that I know plaintiff has requested defendant to move from her said home, and she knows he indicated that he was going to move therefrom; that she read a letter written by defendant while he was in the service in which he said that he did not know
 22 where he was going to live when he got out of the service but that he was not going to live with plaintiff and was not going to live there, meaning plaintiff's said home; that the said statement was made, so defendant said, to remind plaintiff that he had so told her prior to his enlistment; that since plaintiff was forced to leave her said home, as aforesaid, on to wit, September 25th, 1945, I have been acting as her agent therein to those roomers who remained in said home, and that at this said time there now remains but one roomer, to wit, Mr. S. M. Hawk, from whom I have regularly collected his monthly rental prior to that due for the current month of June; that on May 23rd, 1946 I served said roomer with the thirty (30) notice to vacate said room, signed by plaintiff; that thereafter the

defendant informed me that the said roomer had paid him, and I was not to have anything to do with the matters appertaining to the said house.

I further state that I heard the defendant admit that he had slapped plaintiff and had been unreasonably arbitrary in his conduct toward her; and I finally state that the removal of such furniture as has been taken from the home, belonged to plaintiff, and was removed in keeping with her instructions, and that I knew that plaintiff had contracted to sell the said home, and that I also know to whom she has agreed to sell the same, and therefore deny the inferences attempted to be stated as facts, in connection to both the foregoing phases of this case, as are set forth by him the defendant in his affidavit dated June 1st, 1946.

(s) MARGARET L. HAINES.

Subscribed and sworn to before me this
3rd day of June, A. D. 1946.

(s) Bennett S. Jones,
Notary Public in and for
(Seal) the District of Columbia.

**Justice Bailey's Memorandum Denying Judgment
on Default**

23

(Filed June 5, 1946.)

BURTON,

v.

BURTON,

} C. A. 33018.

The plaintiff has filed suit for divorce claiming *inter alia* that she has been compelled by the cruelty of her husband, the defendant, to leave her home in certain property owned by her. The defendant has answered claiming that he is equitably an equal owner with his wife in the home prop-

erty, by reason not of direct payment on the purchase price of the property but by reason of his contributions to the plaintiff for their marriage benefit.

The defendant has also annexed to his answer as a part thereof a counterclaim in which he seeks to set up a resulting trust to a half interest in his wife's property, substantially on the same grounds as those set up in the answer proper, and the Clerk has entered a default for failure of the plaintiff to reply to the counterclaim. He has now moved for judgment on his counterclaim. The counterclaim however, raises no new issue, and no judgment can now be had upon it, for the trial of the case upon the complaint and answer will dispose of all the issues raised in the pleadings.

The default entered by the Clerk has placed the case at issue under the pleadings, and if it has not been placed upon the trial calendar, the Clerk will be directed to do so.

BAILEY,
J.

25 **Motion for a Restraining Order**

(Filed June 5, 1946.)

Comes now the plaintiff, Adalyn Elizabeth Burton, by and through her counsel of record, and moves that this Honorable Court to issue its order herein directed to the defendant, Francis Burton, restraining him from interfering with plaintiff's exclusive right to the use, occupancy, possession, management and control of her house and home, known as premises numbered 6432 8th Street, Northwest, in this City and District, and to restrain him from interfering with plaintiff's right to the disposition

thereof, as well as the furniture and furnishings therein contained, or with the right to use and occupy the same by those holding under plaintiff, either molesting plaintiff or them, therein or elsewhere; and for her reasons for this motion plaintiff relies upon the facts set forth in her Bill of Complaint and the affidavits filed in this cause.

S. JAY McCATHRAN, JR.,
Washington Loan and Trust Building,
Counsel for the Plaintiff.

Note of Calendaring

27	BURTON,
	vs.
	BURTON.

June 5, 1946 Calendared for trial.

28 Defendant's Motion for Interlocutory Injunction to Maintain Status Quo and Restrain Plaintiff From Consummating Sale

(Filed June 11, 1946.)

Comes now the defendant, Francis Burton, by his attorney, and moves this Honorable Court to issue an interlocutory injunction enjoining plaintiff to maintain the *status quo* existing between plaintiff and defendant as to their property rights at the beginning of this civil action and enjoining plaintiff from consummating the sale of 6432 8th Street, N. W., shown to have been made by the affidavits on file in this action, and for grounds states:

1. That defendant seeks only to maintain the *status quo* until the rights of the parties in the marriage property are adjudicated upon trial.

2. Consummation of plaintiff's sale of 6432 8th Street, N. W., shown by the affidavits of plaintiff, her aunt and the defendant on file herein, will result in irreparable injury to defendant's rights in said property.

3. Defendant should not be left solely to the doctrine of *lis pendens* for the protection of his rights in said property.

H. CLAY ESPEY,
Attorney for Defendant,
 313 Southern Building,
 Washington 5, D. C.

30

Order

(Filed June 17, 1946.)

This cause came on to be heard upon the Motion of the Defendant for Judgment on his Counter-Claim, and Plaintiff's opposition to said motion, and counsel for the said parties having argued the same in open Court; and it appearing to the Court that said Counter-Claim raises no new issues but substantially sets forth the same grounds as those set up in the Answer to the Complaint proper; and upon consideration thereof by the Court, it is, this 17 day of June, A. D. 1946,

ORDERED, that the Defendant's Motion for judgment on his Counter-Claim be, and the same hereby is, denied without prejudice to raise the same issues at the hearing.

JENNINGS BAILEY,
Justice.

31 Defendant's Objections to Proposed "Restraining Order" Under Civil Rule 46

(Filed July 1, 1946.)

1. The proposed order is entitled improperly; it should be titled "Preliminary Injunction" or "Interlocutory Injunction" or "Permanent Injunction" under federal Civil Rule 65, as "restraining orders" are issued without notice and "injunctions" upon notice.

2. The proposed "Restraining Order" does not comply with federal Civil Rule 65 (d) in that it does not set forth the "reasons for its issuance", and is entirely too general and vague instead of "specific in terms" as required, in that

- (a) Its necessary effect, without specification, is to pre-judge and foreclose defendant's rights in 6432—8th Street, N. W., without a trial in which evidence is heard, contrary to due process of law and to defendant's asserted and undisproved rights therein as set out in his Counterclaim.
- (b) Its necessary effect, without specification, is that of a summary judgment for plaintiff against defendant's asserted rights in said property, although no motion for summary judgment was made, the proceedings required by federal Civil Rule 56 have not been made, and there are clear issues of fact between the allegations of defendant's untried counterclaim and the allegations and affidavits in plaintiff's behalf upon which the proposed order is based.
- (c) Its necessary effect, without specification, will be that of a permanent injunction requiring defendant to surrender his home in and partial possession of 6432 8th Street, N. W., and to submit to whatever plaintiff desires to do therewith, without hearing or trial of evidence, although the record discloses sharp

issues of fact disputing any right in plaintiff to the proposed order.

32 3. The proposed "Memorandum of Findings of Facts and Conclusions of Law", in attempted compliance with federal Civil Rule 52, does not:

(a) Adequately set out findings of fact and conclusions of law which constitute grounds for the proposed action granting plaintiff's motion for a restraining order, and denying defendant's motion for an interlocutory injunction, in that it fails to state that:

- (1) Defendant is in partial possession of 6432 8th Street, N. W., and that he is now and has been since prior to the institution of this litigation actually residing there and using it as his home.
- (2) Defendant is in such partial possession and is residing there under a claim against his plaintiff wife to a trust in said property in his favor to the extent of one-half of the equity therein, as set out in defendant's counterclaim to the complaint.
- (3) Defendant's counterclaim to a trust does not state a cause of action or for relief (as the Court indicated from the bench at the hearing on June 17, 1946, although defendant submits that the allegations of said counterclaim appear to be sufficient to state a cause of action or for relief within the rule of *Haliday v. Haliday*, 56 App. D. C. 180.)
- (4) Defendant secured the entry by the clerk on May 24, 1946, of plaintiff's default in replying to defendant's counterclaim.
- (5) The order herein of June 17, 1946, denying defendant's motion for judgment of default on his counterclaim, did so "without prejudice to raise the same issues at the hearing."

- (6) Defendant will not suffer irreparable damage and injury, or any damage and injury which cannot be compensated in money, from the "restraining order" and in being forced to leave his home at 6432 8th Street, N. W.
- (7) Plaintiff left said property on September 25, 1945, and has since lived away therefrom, the plaintiff charging that defendant's cruelty forced her to leave, and the defendant denying cruelty and charging that plaintiff deserted him without justification.
- 33 (8) Plaintiff entered into a contract to sell said property after defendant's counterclaim was asserted and filed on March 7, 1946.
- (9) Plaintiff has a clear case for a "restraining order" in her favor, within the rule of Phillips vs. Sager, 51 App. D. C. 103.
- (b) Find any facts, after allowing for findings of defendant's circumstances in this litigation and his untried allegations as to his interest in the property, constituting a clear case why defendant's motion for an interlocutory injunction to maintain the *status quo* and to restrain plaintiff from consummating her sale should not be granted.

Respectfully submitted,

H. CLAY ESPEY,
Attorney for Defendant.

**Justice Bailey's Memorandum Allowing
Preliminary Injunction**

(Filed July 8, 1946.)

34 BURTON
vs.
BURTON

Civil Action No. 33018.

The plaintiff, Mrs. Burton, has brought suit against the defendant, her husband, for a limited divorce on the ground of cruelty. She also seeks to have her husband leave the property where they lived and to restrain him from interfering with her control over the property and any sale that she might make. The defendant has answered denying the charges of cruelty and seeks to set up a resulting trust to a half interest in the property above referred to.

The title to this property was taken in the name of the plaintiff and she avers that she made the first payment for it out of her own funds and has made the subsequent payments from the same source. The defendant claims that it was contemplated that the title to this property should be taken in their joint names but that owing to war conditions the title was taken in the plaintiff's name with the understanding between the parties that it was to be their joint property; that he made physical improvements about the premises paying for the materials with his own funds; that he used his funds for the purpose of food, etc.; sometimes made payments on the house directly with his own funds, "and on a number of occasions drove plaintiff in his automobile to the loan company where plaintiff made payments on the trust."

On the basis of these averments the defendant undertakes to set up a resulting trust to a half interest in this property. He relies on the case of Haliday vs. Haliday, 56 App. D. C. 180. I can see nothing in this case to support his contention. It is true that the general principle is

laid down in that case that a resulting trust can be set up by parol evidence, but the opinion cites with approval the case of Long vs. Scott, 24 App. D. C. in which it was stated that to establish a resulting trust, it must be clearly shown that the whole purchase money was paid by the person seeking to have the trust declared, or that the purchase was of some definite or determinate aliquot part of the property. That is not the situation here. The defendant claims in substance that he has at times made payments on the property, has made some improvements, and although he states that his wife was gainfully employed, he implies that the payments made by his wife were made out of money that he supplied for household purposes. A resulting trust is shown, not by the agreement of the parties, but by their acts.

35 I find therefore that the averments of the cross complaint are insufficient to sustain a resulting trust in the property, the title to which is in her name, and that she is entitled to the possession of the property and to an order restraining the husband from interfering with her possession or from interfering with her sale of the property.

The plaintiff has moved for a restraining order for the relief above stated with reference to her property. While the words "restraining order" have been used in her motion, the real relief which she is seeking is a temporary injunction and such an injunction will issue upon her filing an undertaking in the maximum amount of \$4500.00. Inasmuch as this injunction is one "whereby the possession of property is changed or affected," an appeal to the Court of Appeals is a matter of right, and as counsel for the defendant has signified his client's intention to appeal from the order of injunction I fix the amount of a bond to act as a supersedeas at \$3000.00.

JENNINGS BAILEY,
Justice.

36 Defendant's Objections Under Civil Rule 46 to Proposed Preliminary Injunction

(Filed July 11, 1946.)

1. Defendant's objections are to plaintiff's proposed preliminary injunction, a copy of which was first received by defendant's attorney from plaintiff's attorney by mail on July 1, 1946, a copy of which revised by Mr. Justice Bailey was received with his letter to the undersigned dated July 8, 1946, and received July 9, 1946, inclosing copy of letter to plaintiff's attorney indicating that the re-written order should be left with the Motions Commissioner who probably would see Justice Bailey on Thursday, July 11, 1946, and a copy of the re-written injunction received by mail from plaintiff's attorney on July 11, 1946. Also to the findings in Justice Bailey's memorandum filed about July 8, 1946.

2. The proposed "Preliminary Injunction" does not comply with Civil Rule 65 (d) in that it does not set forth legal and proper "reasons for its issuance," and is entirely too general and vague instead of being "specific in terms" as required, in that

(a) Its necessary effect, without being specific, will be that of a permanent injunction ordering and requiring defendant, *forthwith*, to remove from and surrender his home for several years in and partial possession of 6432 8th Street, N. W., and to submit to whatever plaintiff desires to do therewith, without hearing or trial of evidence, although the record discloses sharp issues of fact disputing any right in plaintiff to the proposed order.

(b) Its necessary affect, without specification, is to pre-judge and foreclose defendant's rights in 6432-8th Street, without trial of evidence, contrary to due process of law and to defendants asserted and undisproved rights therein as set out in his Counterclaim.

(c) Its necessary effect, without specification, is that of a summary judgment for plaintiff against defendant's asserted rights in said property, although no motion for summary judgment was made, the proceedings required by Civil Rule 56 have not been had, and there are clear issues of fact between the allegations of defendant's answer and untried counterclaim and the allegations and affidavits in plaintiff's behalf upon which the proposed order is based.

3. The proposed "Preliminary Injunction" is arbitrary and harsh in that it does not provide any reasonable time—no time whatever,—in which defendant may remove himself, his clothing, furniture, tools and equipment of his plumbing business and other property from the premises, although he has lived there several years, and in that plaintiff has made no showing requiring such arbitrary and harsh action.

4. The memorandum of Mr. Justice Bailey, copy of which was received with his letter of July 8, 1946, on July 9, 1946, embodying his findings, in compliance with Civil Rule 52, is erroneous or insufficient in that:

(a) It fails to give defendant every favorable inference from the allegations of his untried counterclaim in that it fails to give effect to defendant's allegations that plaintiff was the trustee of the family funds kept by her in her own name; that title was taken in plaintiff's name alone with the understanding between the parties that it was their joint property and marriage home meaning that each had a one-half interest in the equity, and that his actions toward the property both in making physical improvement and as owner with plaintiff's acquiescence and consent and in making payments thereon from his own funds as well as driving plaintiff to make payments from the family funds as trustee thereof showed that plaintiff and defendant

both regarded defendant as a half owner of the property.

(b) It fails to state that:

(1) Defendant is in partial possession of 6432 8th Street, N. W., and that he is now and has been since prior to the institution of this litigation actually residing there and using it as his home.

(2) Defendant secured the entry by the clerk on May 24, 1946, of plaintiff's default in replying to defendant's counterclaim.

(3) The order herein of June 17, 1946, denying defendant's motion for judgment of default on his counterclaim, did so "without prejudice to raise the same issues at the hearing."

38

(4) Defendant will not suffer irreparable damage and injury, or any damage or injury which cannot be compensated by money, from the "Preliminary Injunction" and in being forced to leave his home of several years at 6432 8th Street, N. W., forthwith.

(5) Plaintiff entered into the contract to sell said property after defendant's counterclaim was asserted and filed on March 7, 1946.

(6) Plaintiff's alleged sale is *bona fide* and not for the purpose of circumventing defendant's claim to rights in the property.

(7) Who the purchaser is, when the contract was entered into, when possession by the purchaser is required thereunder, nor any other facts ordinarily disclosed and set out when a *bona fide* sale is entered into.

(8) Plaintiff has a clear case for a "Preliminary Injunction" in her favor, within the rule of *Phillips v. Sager*, 51 App. D. C. 103.

(c) Find any facts, after allowing for findings of defendant's circumstances in this litigation and his untried allegations as to his interest in the property,

other than the finding that defendant's counterclaim is insufficient to sustain a resulting trust, constituting a clear case why defendant's motion for an interlocutory injunction to maintain the *status quo* and to restrain plaintiff from consummating her sale should not be granted.

(d) Its requirement of a supersedeas bond of \$3,000.00 is unjust to defendant according to his statements to counsel in the evening of July 10, 1946, in that he is without the means to give security for such a bond and in the opinion of the undersigned it will be impossible for defendant to secure and file such bond.

Respectfully submitted,

H. CLAY ESPEY,
Attorney for Defendant.

Preliminary Injunction

(Filed July 15, 1946.)

This cause came on to be heard upon the motion of the plaintiff and a motion of the defendant, each seeking to enjoin the other, *pendente lite* or preliminarily, from certain acts in respect to premises numbered 6432 8th Street, Northwest, in this City and District, heretofore the marital home of the parties; and it appearing to the Court from the facts set forth under oath in the pleadings and the affidavits filed herein, that title to said property is held by the plaintiff, she having contracted therefor in her own name and has either paid or secured herself to pay the full purchase price therefor; that she has entered into a contract to sell the same, in her own name, and must give occupancy thereof to her purchaser and dispose of the furniture and furnishings therein contained, also purchased

and paid for by her; and that the defendant has refused to move from said premises and is thereby interfering with the plaintiff's rights therein, as well as those holding under her; and that his claim to interest in said premises constitute casual and indefinite payments, if made, and do not constitute a basis for a resulting trust in his favor nor to justify his interfering with plaintiff's exclusive use, control, sale or disposition thereof, or her occupancy of the said property; and counsel for the respective parties having been heard; thereupon, upon consideration thereof, it is, by the Court, this 15th day of July, A. D. 1946,

ADJUDGED AND ORDERED, that the defendant, Francis Burton, be, and he hereby is, enjoined from
 40 interfering with the plaintiff, Adalyn Elizabeth Burton, in her exclusive right to the use, occupancy, possession, management and control of premises numbered 6432 8th Street, Northwest, in the City and District; and that the said defendant is further enjoined from interfering with the said plaintiff's right to dispose of the said premises and property, or from interfering with her rights in the premises given or delegated to those holding under plaintiff; and it is further

ADJUDGED AND ORDERED, that this injunction is granted to the said plaintiff conditioned upon her giving approved security in the sum of Forty-five Hundred Dollars (\$4500.00), for the payment of such costs and damages, if any, as may be incurred or suffered by the said defendant, should it be hereinafter found that the said defendant was hereby wrongfully enjoined; and it is finally

ORDERED, that the motion of the defendant be, and it hereby is, denied.

(S) JENNINGS BAILEY,
Justice.

**41 Motion to Require Deposit in Registry as
 Further Security**

(Filed July 18, 1946.)

Comes now the defendant, by his attorney, and, without hereby waiving any objections or rights defendant may have against the Temporary Injunction Order signed here-in July 15, 1946, moves the Court to order plaintiff, in addition to, but not in lieu of, filing bond and undertaking in the sum of Forty-Five Hundred Dollars (\$4,500.00) required by said order, to deposit in the registry of this Court as further security for defendant in his present situation not less than one half of the proceeds to plaintiff of her sale of 6432—8th Street N. W., permitted by said order of July 15, 1946, conditioned upon said undertaking.

(S) H. CLAY ESPEY,
Attorney for Defendant.

42 Order for Changed and Additional Security

(Filed July 19, 1946.)

This action coming on for consideration of defendant's Motion to Require Deposit in Registry as Further Security and plaintiff's Memorandum in Opposition, and the same having been argued by counsel in open court and submitted, it is, by the Court, this 19th day of July, 1946,

ORDERED that the amount of the security required as a condition to the temporary injunction embodied in order passed herein July 15, 1946, be and it hereby is changed from Forty-Five Hundred Dollars (\$4,500.00) to an undertaking in the penal sum of Eighteen Hundred Dollars (\$1,800.00), and in addition thereto, but not in lieu thereof, plaintiff shall deposit in the registry of this Court as

further security for defendant not less than one half of the net proceeds to plaintiff from her sale of 6432 8th Street, N. W., Washington, D. C., and it is further

ORDERED that plaintiff's sale of said property shall not be deemed consummated and effective until said deposit in the registry of this Court shall have been made.

(S) JENNINGS BAILEY,
Justice.

43

Marshal's Return of Service

(Filed July 26, 1946.)

This is to Certify that Certified Copies of the Orders of this Court, dated July 15th, 1946 and July 19th, 1946, respectively, were served upon the above named defendant, Francis Burton, Personally, at 7:30 o'clock, P. M., on the 24th day of July, A. D. 1946; and that said Order dated July 15th, 1946, was titled "Preliminary Injunction", and said Order dated July 19th, 1946, was titled "Order for Changed And Additional Security".

W. BRUCE MATTHEWS,
United States Marshal.

By: P. S. GRECO,
Deputy United States Marshal.

Notice of Appeal

(Filed August 14, 1946.)

44 ADALYN ELIZABETH BURTON,
 Plaintiff,

VS.

FRANCIS BURTON,
Defendant.

Civil No. 33018.

Notice is hereby given this 14th day of August, 1946, that defendant Francis Burton hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of July, 1946 in favor of plaintiff against said defendant Francis Burton in temporary injunction to restrain defendant from interfering with plaintiff in the use and occupancy of 6432—8th Street Northwest, under which defendant ceased his occupancy and possession on July 25, 1946.

(S) H. CLAY ESPEY,
Attorney for Defendant.

